



Paper No. 5

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OFFICE OF PETITIONS

In re Application of :
Payapali :
Application No. 09/988,728 : **ON PETITION**
Filed: 20 November, 2001 :
Attorney Docket No.: 111.465.132 :
(PROV 104/118/216)

This is a response to the paper styled as a "Petition to Request [a 16 November, 2001], Filing Date," filed on 14 December, 2001, which is being treated as a submission under 37 C.F.R. §1.10(d) requesting that the above-identified application be accorded a filing date of 16 November, 2001, rather than the presently accorded filing date of 20 November, 2001.

The Office regrets the delay in addressing this matter.

The petition is **DISMISSED**.

Petitioner requests the earlier filing date on the basis that the application purportedly was deposited in an Express Mail drop box on 16 November, 2001, pursuant to the requirements of 37 C.F.R. §1.10. In support, petitioner relies upon:

- a declaration, in which petitioner's counsel states that the application was deposited in Express Mail, Label number EL538702903US;
- a copy of a USPS form letter dated 16 November, 2001, discussing the interruption of service;
- a copy of the Express Mail label set forth above as purportedly returned to the Petitioner by the USPS; and
- a copy of a "Verification of Mailing by Express Mail, dated (Sunday) 18 November, 2001, regarding the deposit of the article in question on (Friday) 16 November, 2001.

Presumably, Petitioner theorizes that the correspondence was given an incorrect filing date due to

the suspension of USPS Express Mail Service for mail addressed to Washington D.C. ZIP Codes 202XX through 205XX during November 2001.

Petitioner's attention is directed to the following guidance recently published in the *Official Gazette* of the U.S. Patent and Trademark Office regarding the suspension of Express Mail service:

In some cases a person may use an Express Mail "drop box" without realizing that the local post office is not accepting Express Mail. In that situation, the provisions of 37 C.F.R. §1.10(d) may apply. Usually 37 C.F.R. §1.10(d) is invoked where correspondence is placed in an Express Mail "drop box" prior to the last pick up that is scheduled for the drop box for that day, but the USPS enters an incorrect "date-in" on the Express Mail mailing label, usually the next day's date. To invoke 37 C.F.R. §1.10(d), however, a petition must be corroborated either by evidence from the USPS or by evidence that came into being after deposit and within one business day of the deposit of the correspondence in the Express Mail drop box (e.g., a copy of a log book indicating that the correspondence was deposited on the date in question). See MPEP §513 and TMEP §702.02(e).¹ (Emphasis added.)

Therefore, the petition is properly treated under 37 C.F.R. §1.10(d).

Reviewing the regulation:

- Paragraph (a) of 37 C.F.R. §1.10 states that:

Any correspondence received by the Patent and Trademark Office (Office) that was delivered by the "Express Mail Post Office to Addressee" service of the United States Postal Service (USPS) will be considered filed in the Office on the date of deposit with the USPS. The date of deposit with the USPS is shown by the "date-in" on the "Express Mail" mailing label or other official USPS notation. If the USPS deposit date cannot be determined, the correspondence will be accorded the Office receipt date as the filing date.² (Emphasis added.)

¹ 1253 O.G. 103, 1254 O.G. 33

Similar insight is provided in the Question/Answer discussion published by the Office at <http://www.uspto.gov/september11/uspsnotice01.htm>:

Where mail is put into an Express Mail "Drop Box" and given an incorrect "date in[.]"

In some cases a person may use an Express Mail "drop box" without realizing that the local post office is not accepting Express Mail. In that situation, the provisions of 37 C.F.R. §1.10(d) may apply. Usually 37 C.F.R. §1.10(d) is invoked where correspondence is placed in an Express Mail "drop box" prior to the last pick up that is scheduled for the drop box for that day, but the USPS enters an incorrect "date-in" on the Express Mail mailing label, usually the next day's date. To invoke 37 C.F.R. §1.10(d), however, a petition must be corroborated either by evidence from the USPS or by evidence that came into being after deposit and within one business day of the deposit of the correspondence in the Express Mail drop box (e.g., a copy of a log book indicating that the correspondence was deposited on the date in question). See MPEP §513 and TMEP 702.02(e). (Emphasis added.)

² See 37 C.F.R. §1.6(a).

- Paragraph (d) of 37 C.F.R. §1.10 states that:

Any person filing correspondence under this section that was received by the Office and delivered by the "Express Mail Post Office to Addressee" service of the USPS, who can show that the "date-in" on the "Express Mail" mailing label or other official notation entered by the USPS was incorrectly entered or omitted by the USPS, may petition the Commissioner to accord the correspondence a filing date as of the date the correspondence is shown to have been deposited with the USPS, provided that:

- (1) The petition is filed promptly after the person becomes aware that the Office has accorded, or will accord, a filing date based upon an incorrect entry by the USPS;
- (2) The number of the "Express Mail" mailing label was placed on the paper(s) or fee(s) that constitute the correspondence prior to the original mailing by "Express Mail"; and
- (3) The petition includes a showing which establishes, to the satisfaction of the Commissioner, that the requested filing date was the date the correspondence was deposited in "Express Mail Post Office to Addressee" service prior to the last scheduled pickup for that day. Any showing pursuant to this paragraph must be corroborated by evidence from the USPS or that came into being after deposit and within one business day of the deposit of the correspondence in the "Express Mail Post Office to Addressee" service of the USPS. Any statement submitted in support of such a showing pursuant to this paragraph must be a verified statement if made by a person other than an employee of the USPS or a practitioner as defined in § 10.1(r) of this chapter.

The instant petition lacks the showing required by 37 C.F.R. §1.10(d)(3).

Petitioner's showing is not accompanied by any corroborating evidence from the USPS.

Moreover, Petitioner did not provide a copy of a mail log purporting to show that an Express Mail package with Label No. EL538702903US, the same Express Mail number placed on the transmittal letter for the response, was deposited in Express Mail on 16 November, 2001.

Accordingly, the petition is **dismissed**.³

Any renewed petition must be accompanied by corroborating evidence as above or evidence from the USPS itself.

The application is being forwarded to Technology Center 1600 for examination in due course.

³ Pursuant to Petitioner's authorization, the petition fee (\$130.00) is being credited to Deposit Account 08-0219.

Telephone inquiries concerning this decision may be directed to the undersigned at (703)305-9199.

A handwritten signature in black ink, appearing to read "J. Gillon", with a horizontal line extending to the right.

John J. Gillon, Jr.
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Office of the Deputy Commissioner
for Patent Examination Policy